Filed 6/26/19 In re Amy V. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re AMY V., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. VERONICA V., Defendant and Appellant.	D075240 (Super. Ct. No. J519324F)

APPEAL from orders of the Superior Court of San Diego County, Edlene C. McKenzie, Judge. Affirmed.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Lisa M. Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

In this dependency case, minor Amy V.'s maternal relatives filed a petition for modification under Welfare and Institutions Code section 388[1] (section 388 petition), seeking resource family approval (RFA) and Amy's placement with them. The juvenile court denied relatives' petition on a prima facie basis and proceeded to terminate the parental rights of Veronica V. (Mother) over Amy. On appeal, Mother challenges the court's order on relatives' section 388 petition. She argues that if the order is reversed, we must also reverse the court's subsequent order terminating her parental rights.

We conclude, based on controlling California Supreme Court authority, that Mother lacks standing to challenge the order on relatives' section 388 petition. Moreover, even if Mother possesses standing to appeal, the juvenile court did not abuse its discretion in finding that relatives failed to make a prima facie case on their petition. Accordingly, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Amy was born in July 2015. She was the youngest of six children born to Mother and had five half siblings. The eldest three half siblings (born in 2004, 2007, and 2008) shared one biological father, the middle two half siblings (born in 2012 and 2013) shared a different father, and Amy has a third unidentified father.

In March 2016, the San Diego County Health and Human Services Agency (Agency) filed petitions on behalf of Amy and her half siblings based on their exposure to domestic violence. (§ 300, subd. (b).) Eight-month-old Amy was detained in a

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1 Further unspecified statutory references are to the Welfare and Institutions Code.

separate foster home than her three eldest half siblings, and she has lived apart from them ever since.[2] The juvenile court made a true finding on Amy's petition, declared her to be a dependent, removed her from parental custody, and ordered reunification services for Mother. In August 2016, one-year-old Amy was placed in a new foster home, where she has continuously resided with foster parents who are approved to adopt her.

At the six-month review hearing in November 2016, the Agency reported that it was considering and assessing relatives for Amy's placement, but was waiting for relatives to submit some necessary documentation. The court continued Mother's services for another six months.

At the 12-month review hearing in June 2017, the court terminated Mother's services, finding she had made minimal progress on her case plan. The Agency was continuing its RFA assessment of relatives for placement. Relatives had completed certain tasks, such as health tests, and were working on other tasks, such as child safety classes.

In a section 366.26 report filed in September 2017, the Agency reported it had serious concerns about placing Amy and her half siblings with relatives because of maternal great-uncle's "lengthy criminal history and his lengthy [child welfare services]

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2 In May 2016, Amy's two middle half siblings were placed in the home of their paternal relatives; henceforth, Amy also lived apart from them.

The children could not be placed together on an emergency basis with maternal great-aunt and her husband (together, relatives), because maternal great-uncle had a criminal and child welfare history. By his own admission, he had two "DUIs" from 2007 and 2000, a past "domestic violence case with an ex-wife," and "a history of entering the country illegally." Before any children could be placed with relatives, they had to complete the RFA process. (See § 16519.5.)

history that includes more than 10 substantiated referrals for physical abuse and general neglect of his children."[3] The Agency assessed Amy to be adoptable and recommended she remain placed with her foster parents, with whom she had resided for over a year by then. Likewise, the Agency recommended that Amy's eldest three half siblings remain together in their foster home.

Amy visited with her half siblings about once a week. These visits generally went well; however, because of the significant age gap between Amy (who was a toddler) and her eldest half siblings, and the fact that they did not all live together, she did not develop a strong sibling bond with them. Likewise, Amy did not develop a bond with Mother. Rather, Amy was firmly attached to her foster parent caregiver, who she referred to as "mommy."

The scheduled permanency planning hearing (section 366.26 hearing) was continued several times in late 2017 and 2018 for multiple reasons, including to allow the Agency to complete the RFA assessment of relatives. The Agency reported its progress to the court in several addendum reports. In July 2018, the Agency reported that relatives' application for RFA was denied. In August 2018, a formal notice of action, with the procedure to appeal the decision, was personally served on relatives. Relatives requested an administrative appeal. In a letter dated September 12, 2018, the Agency

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[3] The Agency reported that maternal great-uncle had a significant history of physically and emotionally abusing his children, which caused his eldest son to become abusive of other younger children. Despite Agency's requests, relatives allowed the eldest son to remain in their home for some time. Although relatives disputed they posed any current threat to Amy's safety, they did not dispute the fact of their past child welfare history.

acknowledged receipt of their appeal request and advised them that further communications would be forthcoming.

On November 7, 2018, the date scheduled for the continued section 366.26 hearing, relatives filed a section 388 petition seeking Amy's placement with them. As changed circumstances to support their petition, relatives stated that the "state has failed to respond to the [RFA] appeal . . . in a timely manner." Relatives alleged it would be in Amy's and her three eldest half siblings' best interests to be placed together with relatives. The court continued the section 366.26 hearing as to Amy and set a prima facie hearing on relatives' section 388 petition.[4]

In December 2018, at the prima facie hearing, relatives' counsel stated that "the reason that we filed [the section 388 petition] is because this [RFA appeal] process is simply not moving fast enough." Mother's counsel joined in relatives' position. In opposition, Amy's counsel contended there had been no showing (1) of changed circumstances or (2) that a change in Amy's placement would be in her best interests. Amy's counsel argued that relatives had not been a viable placement option since they first came forward, and their status was unchanged; there had already been significant delays in selecting Amy's permanent plan; and it was in her best interest to achieve

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4 Regarding Amy's three eldest half siblings, the court selected foster care as their permanent plan pursuant to section 366.26, subdivision (c)(1)(b)(iv).

permanency. The Agency argued that relatives had an administrative appeal available to them, which was a remedy they had to exhaust before seeking court intervention.[5]

After considering the petitions, responses, and arguments of counsel, the court decided that relatives had not made a prima facie case on their section 388 petition. The court discussed that administrative remedies were available to relatives and had not been exhausted; furthermore, it found that there had been no showing of changed circumstances or that a change in placement would be in Amy's best interests.

Subsequently, at the continued section 366.26 hearing in January 2019, the court terminated Mother's parental rights over Amy. The court found Amy to be specifically and generally adoptable. In addition, the court carefully considered and rejected the (1) beneficial parent-child relationship and (2) sibling bond exceptions to termination of parental rights (§ 366.26 (c)(i)(B(i), (v)).

Mother filed a timely appeal of the orders denying relatives' section 388 petition and terminating her parental rights.[6]

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[5] Counsel for Amy's half siblings joined in the Agency's arguments and indicated she did not support her clients' placement with relatives at that time.

[6] On appeal, Mother does not contend the court erroneously terminated her parental rights or challenge the court's findings made at the section 366.26 hearing.

DISCUSSION

I. *Mother Lacks Standing to Appeal the Order on Relatives' Section 388 Petition*

Mother claims she has standing to appeal the juvenile court's order denying relatives' section 388 petition despite her lack of parental rights over Amy. She primarily argues that her parental rights were intact at the time of the challenged order, she supported Amy's placement with relatives, and "it is possible, if not likely, that relative placement would [have] cause[d] Mother's parental rights to remain intact." We do not find merit in Mother's position.

"Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (*In re K.C.* (2011) 52 Cal.4th 231, 236 (*K.C.*).)

Once a parent's rights over his or her child have been terminated, the parent no longer possesses a "legally cognizable interest" in the child's care, custody, or affairs. (*K.C.*, *supra*, 52 Cal.4th at p. 237.)

K.C. stood in the same procedural posture as this case. There, an appealing father asserted he had standing to appeal grandparents' denied section 388 petition, which sought the minor's placement with them, even though father's parental rights were terminated after the petition was denied. (*K.C.*, *supra*, 52 Cal.4th at p. 235.) However, on appeal "father did not argue the court erred or abused its discretion in terminating his

rights. Instead, father limited his argument to the question of K.C.'s placement and contended that, should the Court of Appeal reverse the placement order, the court should also reverse the judgment terminating parental rights to restore the parties to their prior positions." (*Id.* at p. 235.)

Our high court, after examining relevant case law, distilled the following rule: "A parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights." (*K.C.*, *supra*, 52 Cal.4th at p. 238; see *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061-1062 [resolution of placement issue had potential to alter the decision to terminate parental rights]; *In re H.G.* (2006) 146 Cal.App.4th 1, 18 [child's removal from grandparents' custody could impact order terminating parental rights].)

Here, Mother's parental rights have been terminated, and she does not assert the termination order was independently erroneous. Thus, Mother possesses no "legally cognizable interest" in Amy's placement with relatives unless reversing the RFA/placement decision would potentially alter the decision to terminate her parental rights. (*K.C.*, *supra*, 52 Cal.4th at p. 237.)

Mother argues that, if Amy had been placed with relatives, it is possible the court might have selected a plan other than adoption, and Mother's parental rights would not have been terminated. We are not persuaded the court would have selected a plan other than adoption. It was uncontested that Amy was adoptable; she was very young and healthy. Even if the court had placed Amy with maternal relatives, it would have

proceeded to find her adoptable and to terminate parental rights. (See *In re A.K.* (2017) 12 Cal.App.5th 492, 500 [rejecting same argument and finding that father's parental rights would have been terminated even if minor had been placed with paternal grandmother].) Relatives were interested in adopting Amy. No exceptions to termination of parental rights and adoption applied.

Mother also argues she possesses standing to appeal because she strongly advocated for Amy to be placed with relatives while her parental rights were still intact. This very argument was considered and rejected in *K.C.*: " '[T]he mere fact a parent takes a position on a matter at issue in a juvenile dependency case that affects his or her child does not alone constitute a sufficient reason to establish standing to challenge an adverse ruling on it.' " (*K.C.*, *supra*, 52 Cal.4th at p. 239.) Moreover, even though we resolve doubts in favor of standing and construe standing liberally, these general principles "do not displace the fundamental rule that only a person aggrieved by a decision may appeal." (*Id.* at pp. 238-239.)

Accordingly, Mother is not an aggrieved party and lacks standing to challenge the prima facie denial of relatives' section 388 petition.

II. *Relatives Failed to Make a Prima Facie Case on Their Section 388 Petition*

Even assuming Mother has standing to appeal the order on relatives' section 388 petition, we conclude the juvenile court did not abuse its discretion in denying the petition on a prima facie basis.

Under section 388, a party may petition to change or set aside a prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(l); see Cal. Rules

of Court, rule 5.570(a).)[7] The juvenile court shall order a hearing if "it appears that the best interests of the child . . . may be promoted" by the proposed change of order. (§ 388, subd. (d).) Accordingly, a petitioner must make a prima facie showing of *both* a change in circumstances or new evidence *and* the promotion of the child's best interests to trigger a right to hearing on a section 388 petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. (Rule 5.570(d)(1); *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) While the petition must be liberally construed in favor of its sufficiency (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806; rule 5.570(a)), the allegations must nonetheless describe specifically how the requested change of order will advance the child's best interests. (*Anthony W.*, *supra*, at p. 250; *Zachary G.*, *supra*, at p. 806.)

After reunification efforts have terminated, the juvenile court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) " 'A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.' " (*In re*

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7 Further rule references are to the California Rules of Court.

J.C. (2014) 226 Cal.App.4th 503, 527.) Therefore, after reunification services have terminated, a petitioner "must establish how such a change will advance the child's need for permanency and stability." (*Ibid*.)

We review the denial of a petition for modification under section 388 for an abuse of discretion. (*In re Y.M.* (2012) 207 Cal.App.4th 892, 920.)

In this case, we conclude relatives' section 388 petition failed to make a prima facie showing of changed circumstances or new evidence. Further, relatives failed to show that a modified placement order would have promoted Amy's best interests.

In their petition, relatives claimed the changed circumstance or new evidence was that the "state has failed to respond to the appeal made . . . in a timely manner," i.e., their administrative appeal of the RFA denial was not proceeding quickly enough. However, the administrative appeal *was* proceeding. We are not convinced relatives presented a changed circumstance or new evidence within the meaning of section 388. Relatives were still unapproved for placement. They were appealing that decision. There had been no change. Further, "new evidence" in the context of section 388 means "material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered." (*In re H.S.* (2010) 188 Cal.App.4th 103, 105.) Relatives were not contending they had some new, material evidence about themselves or their background; they simply wanted the administrative appeal to "mov[e] fast[er]."

Moreover, even if the ongoing appeal of the RFA decision somehow constituted a changed circumstance, relatives did not demonstrate that placing Amy with them in late

2018 or further delaying the selection of her permanent plan was in her best interests. By that time, Amy had been living with her caregiving foster parents for over two years, constituting a large majority of her life, and her foster parents wished to adopt her. Amy had never lived with relatives. The record amply supports that Amy was stably placed and strongly bonded to her foster parents, and that she did not share a bond with her half siblings, Mother, or relatives. On this record, the court did not abuse its discretion in finding that relatives had not shown that modifying Amy's placement would be in her best interests.[8]

DISPOSITION

The orders are affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.

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8 Given our conclusion, we need not address whether the juvenile court had the authority to review the RFA denial.